Supreme Court, U. S.
FILED
JAN 21 1975
MICHAEL RODAK, JR., CLERK

No. 35, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' EXCEPTIONS

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' EXCEPTIONS

STATEMENT

This original case was brought by the United States against the defendant States—Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia[1]—to determine whether the United States or the defendant States has the right to explore and exploit the natural resources of the outer continental shelf underlying the Atlantic Ocean, *i.e.*, the seabed and subsoil more than three geographical miles seaward from the coastline. The Court referred the matter to the Special Master to submit a report recommending findings of facts and conclusions of law. 398 U.S. 947.

[1] The State of Florida also was named as a defendant, but the case against Florida was severed and tried separately before the Special Master as No. 52, Original. That case, like this one, is presently pending before the Court on exceptions.

The proceedings before the Special Master involved the taking of hundreds of pages of testimony, the submission of hundreds of documentary exhibits, and the filing of lengthy post-trial briefs, all of which are now before the Court as the record in this case.[2] Following a review of this record, the Special Master submitted his Report to the Court on August 27, 1974.

The Special Master determined (Report, pp. 8–21) that the defendant States' claims to the seabed seaward of the three-mile territorial sea are foreclosed by this Court's decisions in *United States* v. *California,* 332 U.S. 19, and subsequent tidelands cases. The Special Master nevertheless reviewed and weighed the extensive evidence and legal arguments concerning the historic basis of the *California* decision in order to assist this Court should it wish to reconsider that decision, and he concluded that the rule announced in *California* was legally and factually sound. In particular, the Special Master found (1) that at the time of the American Revolution, British law did not recognize a sovereign right to ownership of the seabed of the outer continental shelf (Report, pp. 25–47); (2) that the English charters establishing the American colonies did not grant ownership of the seabed (Report, pp. 47–56); (3) that colonial activities do not support the defendant States' contention that the colonies either had been granted or claimed or exercised dominion and control of the seabed beyond the three-mile marginal sea (Report, pp. 56–60); (4) that even if the colonies had, contrary to the evidence, been granted or had exercised such dominion and control, their rights would have passed to the United States as attributes of external sovereignty at independence or upon ratification of the Constitution (Report, pp. 60–65); and (5) that the defendant States did not acquire any interest in the seabed of the outer continental shelf subsequent to ratification of the Constitution (Report, pp. 65–72).

[2] We are lodging with the Clerk additional copies of our post-trial briefs so that convenient reference may be made thereto. Defendant "Common Counsel" States—Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, and Virginia—have printed their post-trial briefs (with some amendments) as a "supplemental brief" in support of their exceptions.

The defendant States have excepted to virtually all the Special Master's principal proposed findings of fact and conclusions of law. See C.C. Br. 4–5; S.S. Br. 1–2.[3] The United States has filed no exceptions and submits this brief in response to the defendant States' briefs in support of their exceptions.

SUMMARY OF ARGUMENT

I

The issue in this case is whether the United States or the defendant States has the paramount right to the natural resources of the seabed of the outer continental shelf of the Atlantic Ocean. The defendant States' claims are based upon two alternative hypotheses: (1) that as the successors to the

[3] "C.C. Br." and "S.S.Br." refer respectively to the briefs of defendant "Common Counsel" States (see note 2, *supra*), and of the three southern States (North Carolina, South Carolina, and Georgia) in support of their exceptions to the Special Master's Report.

American colonies (or the English Crown) they are the historic owners of the seabed resources of the outer continental shelf or (2) that, in any event, as coastal sovereigns they are entitled to those resources as against the United States. Both these arguments are foreclosed by this Court's decisions in *United States* v. *California,* 332 U.S. 19, and subsequent tidelands cases.

A. In *California,* this Court determined that neither the American colonies nor the thirteen original states, before or after independence, had possessed rights in the seabed resources even of the three-mile territorial sea. And in *United States* v. *Louisiana,* 339 U.S. 699, the Court concluded that it follows *a fortiori* that the states lacked rights in the resources of the outer continental shelf. Thus insofar as defendants' claim rests upon an assertion of historic title, that claim already has been decisively rejected by this Court.

Defendants ask this Court to re-examine the evidence relating to their assertion of historic title on the ground that the evidence was inadequately presented in *California.* But the *California* decision was based, as the Court there stated, upon a "multitude of references" and a "wealth of material" (332 U.S. at 31), and the additional evidence presented by defendants here is largely cumulative and contributes little, if anything, to the body of historical knowledge that was before this Court in *California.* Moreover, several of the defendant States participated as *amici curiae* in California and therefore had

ample opportunity at that time to call the Court's attention to additional materials. Any failure on their part to make full use of that opportunity would not justify a suspension of the normal operation of the doctrine of *stare decisis.*

B. This Court further decided in *California* that because (1) the United States had acquired dominion and control over the territorial sea through the exercise of its foreign-affairs and defense powers and (2) the territorial sea was primarily affected by national concerns relating to defense, international relations, and commerce, "the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil." 332 U.S. at 38–39. As a necessary corollary, the United States possesses paramount rights in the resources of the seabed of the continental shelf, dominion and control over which also were acquired by the United States through the exercise of its foreign-affairs powers. See *United States* v. *Louisiana, supra; United States* v. *Texas,* 339 U.S. 707. Thus defendants' alternative argument—that the individual states and not the United States are entitled to the resources of their adjacent seabeds merely by virtue of their status as coastal sovereigns—also has been rejected by this Court.

Accordingly, the defendant States' claims are foreclosed under the doctrine of *stare decisis.* There is no reason for this Court to re-examine the historical and policy bases of its *California* decision.

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II

The evidence does not in any event support defendants' claim of historic title to the seabed of the outer continental shelf.

A. Defendants' claim of historic title rests in part upon the assumption that at the time of the American Revolution, British law recognized the coastal nation's sovereign ownership of the seabed of the outer continental shelf. But the evidence establishes that British law did not recognize such ownership.

1. Prior to the Stuart accession in 1603, the Crown exercised only a protective maritime sovereignty, which it shared with neighboring coastal nations, for the purpose of excluding pirates and protecting commerce and navigation. The Crown claimed no property right in the seabed and recognized no such right in other coastal nations. The seas and seabed were treated as *res communes,* free and common to all.

2. During the Stuart era (1603–1688), the Crown asserted general sovereignty over the adjacent English seas, an incident to which was a claim to ownership of the seabed. The basis for this assertion of general sovereignty was Britain's effective naval control of the English seas. The Crown did not recognize in other coastal nations any inherent sovereign ownership or control of their adjacent seas and seabed.

3. The Stuart era proved to be the high tide of British maritime pretensions. During the eighteenth century, British maritime policy reverted to the historic assertion of a merely protective sovereignty over the English seas with, in addition, a limited claim to certain fisheries based upon occupation and use. The

Crown abandoned all general territorial claims to the seas and seabed. By 1776, the extravagant Stuart pretensions had disappeared "without * * * leaving a single juridical or international right behind * * *." Report, p. 40.

During the late eighteenth and early nineteenth centuries, international law gradually came to recognize that each coastal nation possessed an inherent sovereign right to exercise protective jurisdiction over the three-mile marginal sea. But throughout the eighteenth century the resources of the seabed could be claimed only on the basis of appropriation through occupation and use. Only during the nineteenth century did the three-mile rule become a basis for the assertion of territorial sovereignty and seabed ownership.

B. Defendants' claims here principally derive from their status as successors to the American colonies. But the colonies had not possessed any rights to the resources of the seabed of the outer continental shelf.

Britain never claimed territorial sovereignty over the seas adjacent to the American colonies, and the English charters establishing those colonies did not purport to grant ownership of those seas or their beds. The scant evidence of American colonial maritime activities does not support defendants' claim that the colonies had been granted or claimed ownership of the seabed of the adjacent seas. Moreover, any rights to the adjacent seas that could have passed under the charters would have done so as incidents of government, and all colonial governmental powers had reverted to the Crown prior to independence.

C. But even if British law had recognized the coastal nation's inherent sovereign ownership of the outer continental shelf, and the English charters had conveyed the seabed to the colonies, ownership of the seabed nevertheless would have passed to the United States at independence or upon ratification of the Constitution.

The United States was created at independence as a single nation and was recognized as such under international law. See, *e.g.*, *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304. Any inherent seabed ownership then recognized under international law would have been an incident of external sovereignty and would have passed to the United States as the external sovereign at independence.

But if the United States had not in fact achieved full external sovereignty in 1776, any inherent sovereign ownership of the adjacent seas and seabed would in any event have passed to the United States upon ratification of the Constitution, for ratification completed a process of nationalization that vested all external sovereignty in the federal government.

D. The defendant States did not acquire rights in the resources of the seabed of the outer continental shelf at any time after ratification of the Constitution.

1. The acceptance by the United States of the three-mile territorial sea as a customary rule of international law barred the individual states from making or

maintaining any claims of inherent coastal sovereignty over or ownership of the outlying seas and seabed. Only claims based upon occupation and use were recognized in those seas during the nineteenth and early twentieth centuries, and the defendants have presented no evidence that they ever achieved an effective occupation of even a portion of the vast seabed that they claim here.

2. The acquisition of the natural resources of the seabed of the outer continental shelf was accomplished by the United States through the exercise of its powers over foreign affairs. Moreover, protection and control of the outer continental shelf is a function that properly belongs to the external sovereign. "The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea." *United States* v. *Louisiana, supra,* 339 U.S. at 705. Accordingly, the inherent sovereign rights presently recognized by international law in the resources of the seabed of the outer continental shelf belong to the United States as an incident of its external sovereignty.

3. The defendant States are not constitutionally entitled to establish property rights to the natural resources of the seabed out to three leagues from shore on the same basis as the Gulf coast States. *Alabama* v. *Texas,* 347 U.S. 272.

ARGUMENT

I

THE DEFENDANT STATES' CLAIMS TO THE SEABED SEAWARD OF THE THREE-MILE TERRITORIAL SEA ARE FORECLOSED BY THIS COURT'S DECISIONS IN *UNITED STATES* V. *CALIFORNIA* AND SUBSEQUENT TIDELANDS CASES

Prior to the referral of this case to the Special Master, the United States moved for judgment on the pleadings. Without acting on that motion, this Court referred the case to the Special Master. The Special Master "assumed that this action by the Court was not intended to be construed as a denial of the motion for judgment but rather as an indication of the Court's desire for a full development of and report on the facts in the light of which to consider the issues involved." Report, pp. 8–9. Accordingly, the Special Master considered the merits of the motion for judgment and concluded that the prior decisions of this Court require as a matter of law the entry of judgment for the United States. Report, pp. 8–21.

The Special Master's conclusion was based principally upon *United States* v. *California,* 332 U.S. 19, *United States* v. *Louisiana,* 339 U.S. 699, and *United States* v. *Texas,* 339 U.S. 707. As the Special Master pointed out, in *California* this Court determined that the colonies did not, at the time of independence, possess rights in the seabed of the three-mile marginal sea, and that dominion and control over that seabed was subsequently acquired not by the individual Atlantic coast states but by the United States in its capacity as external sovereign. See *United States* v.

California, supra, 332 U.S. at 32–34. The Court therefore held that California ~~was~~ was not entitled to ownership of the adjacent Pacific Ocean seabed under the "equal footing" doctrine. Moreover, "because the territorial sea was primarily affected by national concern for defense, international relations, and foreign commerce * * * " (Report, p. 12), the Court in California declined "to transplant the *Pollard*['s *Lessee* v. *Hagan,* 3 How. 212], rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean * * *." 332 U.S. at 36. Accordingly, the Court concluded (332 U.S. at 38–39):

> * * * California is not the owner of the three-mile marginal belt along its coast, and * * * the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.

This conclusion and the principles on which it was based were expressly reaffirmed by the Court in *United States* v. *Louisiana, supra,* and *United States* v. *Texas, supra.*

The Special Master correctly determined that this case is governed by the rule of paramount federal rights in the adjacent seas enunciated by the Court in *California.* As we now show, the defendant States' arguments to the contrary are insubstantial.[4]

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[4] Defendants' first argument—that they were not parties to the *California* litigation (see C.C. Br. 11)—does not support their exceptions. It is relevant only to application of the doc-

1. Defendants' principal argument (C.C. Br. 11–12, 15–24; S.S. Br. 74–77, 79–80) is a repetition, although in somewhat different form, of the argument they made before the Special Master. Defendants argued to the Special Master that this Court's *California* decision was not controlling here because (1) that decision was based upon the presumption that foreign-affairs and defense powers are necessarily inseparable from dominion and control over the adjacent seabed and (2) that that ground of decision had been repudiated and disproved both by Congress, in enacting the Submerged Lands Act, 43 U.S.C. 1301, *et seq.*, which ceded to the coastal states ownership of the adjacent seabed within a certain distance from the coastline, and by this Court, in upholding claims under the Act in *United States* v. *Louisiana*, 363 U.S. 1, and *United States* v. *Florida*, 363 U.S. 121. See C.C. Supp. Br. 428–439. The Special Master correctly rejected that argument (Report, p. 16):

> I do not agree with this analysis, finding nothing in the *California*, first *Louisiana* or *Texas* cases to support the basic premise underlying the defendants' argument. It is true that this Court in the *California* case said that dominion over the resources of the soil under the water of the territorial belt of the sea is an incident of the paramount rights of the federal government in that belt of the sea. But the Court did not indicate that the federal government by

trine of *res judicata*, and the Special Master explicitly stated that defendants' arguments were barred not by the doctrine of *res judicata* but by that of *stare decisis*. See Report, pp. 14–15.

> Act of Congress might not, as it did by the subsequently enacted Submerged Lands Act, grant to the riparian states rights to the resources of the federal area, subject to the reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs.

Defendants do not here renew their claim that the *California* decision was in fact based upon a presumed inseparability of foreign-affairs and defense powers with ownership of seabed resources. Any such claim would of course be incorrect. The significance of federal foreign-affairs and defense powers in *California* was two-fold: (1) the United States originally had acquired dominion and control over the territorial sea through the exercise of those powers, and (2) the degree to which the territorial sea is affected by those powers made it inappropriate for the Court, as the explicator of constitutional doctrine, to extend the *Pollard* rule of state riparian ownership of inland waters "out into the soil beneath the ocean * * *." *United States* v. *California, supra,* 332 U.S. at 36. It is, moreover, clear that the Submerged Lands Act affirmed rather than repudiated the basis of the *California* decision. "By that Act the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits." *United States* v. *Louisiana, supra*, 363 U.S. at 6–7. And, as the Special Master noted, "[i]t is quite obvious that Congress could reserve to the federal government all

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the rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea * * * only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case." Report, p. 19. This conclusion is reconfirmed by the fact that Congress expressly asserted federal ownership of the natural resources of the seabed of the Atlantic Ocean seaward of the territorial sea in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*, and in doing so necessarily relied upon the *California* decision.

Instead, defendants now take the position that the Special Master himself read the *California* decision as resting upon a presumed inseparability of foreign-affairs and defense powers with ownership of seabed resources, that such a reading is manifestly incorrect in view of the decisions of this Court sustaining the Submerged Lands Act and upholding state claims thereunder, and therefore that the Special Master's reliance upon *California* was grounded in error. See C.C. Br. 11–12, 15–24. In short, defendants impute to the Special Master the very view of the *California* decision that they urged upon him, and that he expressly rejected, and they claim that his alleged adoption of that view requires disaffirmance of his Report. Defendants' argument on this point is so evidently based upon a misreading of the Special Master's Report that it requires no further discussion.[5]

[5] Defendants' further contention, that the rationale underlying the cession of seabed rights in the Submerged Lands Act "must apply fully beyond the three-mile/three-league limit" (C.C. Br. 24; see also S.S. Br. 78), should of course be addressed to Congress, not to this Court.

2. Defendants next contend (C.C. Br. 12–14; S.S. Br. 75) that the *California* decision is inapplicable here because that decision (a) did not rest upon a definite determination that the defendant states "lacked ownership rights in the seabed resources" (C.C. Br. 13) and (b) was concerned with the three-mile territorial sea rather than, as here, the outer continental shelf. This contention is without merit.

a. This Court's determination that the Atlantic coast states, and their predecessor colonies, had no ownership interest in the seabed adjacent to their shores was of course integral to its conclusion that California was not entitled to the resources of its adjacent seabed under the equal footing doctrine. As the Special Master stated (Report, p. 10; footnote omitted):

> After reviewing a multitude of cited documents, consisting of a great many, but not all, of those included in the present record, [the Court] held that the equal footing doctrine did not support [California's] claim because the 13 original states had not themselves acquired as colonies and did not separately own the natural resources of the seabed of the adjacent territorial sea.

b. Although this Court in *California* was concerned only with ownership of the resources of the seabed of the three-mile territorial sea, the principle of federal ownership announced therein is applicable, and has subsequently been applied by this Court, to the seabed of the outer continental shelf. As the Court noted in *United States* v. *Louisiana, supra,* 339 U.S. at 705:

> If, as we held in California's case, the three-mile belt is in the dominion of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea.[6]

3. Defendants finally contend (C.C. Br. 24–30; S.S. Br. 71–74; see also C.C. Br. 104–110) that this Court erred as a matter of policy in refusing to extend the rule of *Pollard's Lessee* v. *Hagan*, 3 How. 212, to ocean waters. They argue that state ownership of submerged lands is "consistent" with the constitutional framework and that the *California* decision defeated expectations based upon certain nineteenth-century decisions of the Court.[7] Neither of these arguments is a basis for overruling *California*.

[6] Defendants suggest (C.C. Br. 13) that this application of the *California* rule to the outer continental shelf was improper because, they allege, the *California* decision was based merely upon California's failure to prove that "the Atlantic coastal States were possessed of a uniform three-mile belt in the ocean along their respective coasts" whereas they here disavow any intention of showing a uniform belt of ownership. Their contention is frivolous. California had undertaken to show not that the Atlantic coast states possessed a uniform three-mile ocean belt but rather that "the 13 original states had acquired * * * ownership * * * within *at least* three miles of their respective coasts * * *." Report, p. 10; emphasis added. This Court would not have rejected California's claim under the equal footing doctrine if it had believed that the original states, as the defendants here contend, owned the seabed resources of the entire Atlantic continental shelf.

[7] Defendants also assert that their economic and regulatory interests would be served by their ownership of the resources of the outer continental shelf. See also the brief *amicus curiae* of the Special Committee on Tidelands of the National Association of Attorneys General. That, of course, is why they litigate this case, but it is not an independent reason for overruling a prior decision of this Court. It is, moreover, obvious that the federal government has similar competing interests (in addition to its unique national defense, foreign affairs, and world commerce interests) in owning the seabed rights here at issue.

Defendants' constitutional argument—that the states are the residuary owners of public lands not otherwise allocated—assumes that the seabed rights at issue here and in *California* were "public lands" owned by the individual states at the time of the ratification of the Constitution.[8] But the Court in *California* expressly repudiated that assumption, holding instead that acquisition of the marginal sea was accomplished by the federal government after ratification. 332 U.S. at 32–33. Thus the Constitution no more requires individual coastal state ownership of adjacent seabeds than it does individual eastern state ownership of the adjacent western lands acquired through the Louisiana Purchase.

This Court in *California* considered the earlier precedents upon which defendants now rely and properly determined that they neither required nor justified extension of the *Pollard* inland-water rule to the adjacent seas. The Court correctly distinguished between inland waters and the sea. Inland waters are principally affected by domestic and local concerns.

[8] We show below (see p. 50, *infra*) that in any event any state ownership of the adjacent seas and seabed would have passed to the United States upon ratification of the Constitution.

In contrast, "the sea is affected by the interests and activities of other nations in a very different way, and very much more directly and immediately, than is the land, and * * * the existence and preservation of our national rights in the marginal sea are largely dependent upon the ability of the federal government to carry out its responsibilities in the fields of foreign commerce, international relations and national defense." Report, p. 23. In view of the extent to which the adjacent sea is affected by national concerns respecting defense, commerce, and international relations—matters which are allotted to the jurisdiction of the federal government under the Constitution—this Court had ample basis for concluding that decisions respecting the use or disposition of the land beneath that sea are, in the first instance, constitutionally vested in Congress and not the individual states.

4. Defendants' principal basis for requesting reconsideration of the rule of federal paramountcy in the adjacent seas, and review by this Court of the evidence presented to the Special Master, is their assertion that the historical record was inadequately presented in the *California* case.[9] But the *California* decision was based not, as defendants suggest, upon a "lack of evidence" (C.C. Br. 13), but rather upon a "multitude of references" and a "wealth of material." *United States* v. *California, supra,* 332 U.S. at 31.

[9] We question whether that assertion, even if true, would warrant a departure from the doctrine of *stare decisis* in view of the substantial reliance that Congress, the states, and the federal government have placed upon the *California* decision in the thirty years since it was handed down.

The Special Master correctly noted that "many of the historical documents, although admittedly not all, which have been introduced as exhibits in this proceeding were before this Court in the *California* case." Report, pp. 14–15. The additional documents and other evidence submitted by the defendant States here are largely cumulative; they contribute little, if anything, to the body of historical knowledge that was before this Court in *California.*

Moreover, three of the defendants—Massachusetts, New York, and New Jersey—participated in *California* as *amici curiae,* and all of the defendants could have done so. See Report, p. 14. They therefore had a sufficient and timely opportunity to adduce additional materials in that case. Their failure to do so does not constitute a ground for permitting them to relitigate the issues that were there decided against *California.*

For all these reasons, this Court should accept the Special Master's determination that *California* governs this case under the normal rules of *stare decisis.* There is no need for this Court once again to examine the historical basis of the principle of federal paramountcy for which that decision stands.

II

THE EVIDENCE DOES NOT SUPPORT DEFENDANTS' CLAIM OF TITLE TO THE SEABED BEYOND THE TERRITORIAL SEA

In order to assist this Court in the event that a reexamination of the evidentiary basis of the *California* holding is undertaken, the Special Master meticulously reviewed the exhaustive historical evidence that has

been submitted by the parties here and correctly concluded that the evidence does not support defendants' claim of title to the seabed beyond the territorial sea. We believe that the Special Master's findings are correct and should be accepted.[10]

To overcome the Special Master's conclusion defendants must show (1) that British law recognized sovereign ownership of the seabed of the outer continental shelf adjacent to the colonies at the time of the American Revolution and either (a) that England had conveyed ownership of that seabed in the colonial charters and the individual states rather than the United States ultimately succeeded to the colonial claims or (b) that Crown claims passed to the individual states at independence and were retained by them into the twentieth century or (2) that the individual states in some manner independently acquired title to the resources of the outer continental shelf subsequent to ratification of the Constitution.[11]

[10] Defendants attempt to impeach the Special Master's Report by claiming that his review of the evidence was biased by his view that the ultimate legal issue here is controlled by California as a matter of *stare decisis*. See C.C. Br. 14–15. There is no basis for that claim. The Special Master's evaluation of the evidence is manifestly fair and objective.

[11] Defendants have proceeded throughout this litigation on the erroneous assumption that their extravagant claims to the outer continental shelf must be sustained if they can show that at some point in history they possessed dominion and control over stretches of seabed within three miles of shore. See, *e.g.*, C.C. Br. 37–38. Although we believe defendants have failed to make even the latter showing, such a showing would in any event be immaterial to the issue in this case. That issue—if this Court undertakes to re-examine the historical basis of its *California* decision—is whether the thirteen original states, before or after ratification of the Constitution, acquired permanent ownership, *vis-a-vis* the federal government, of the seabed of the outer continental shelf. There is no question here concerning ownership of the seabed of the territorial sea; that question was settled in the states' favor by the enactment of the Submerged Lands Act.

Presumably because the evidentiary record in this case is so extensive, defendants in their principal briefs have not attempted to discuss those issues with the particularity that would be required if this Court were to undertake a full re-examination of the *California* rule. We likewise have determined to present here a summary discussion of the evidence and to refer the Court to the fuller discussion contained in the several briefs that were filed with the Special Master. Any decision by this Court on the evidentiary questions raised by defendants in their exceptions would of course have to be based upon those briefs and the evidentiary record. With this general consideration in mind, we turn to a review of the principal contentions.

A. AT THE TIME OF THE AMERICAN REVOLUTION, BRITISH LAW DID NOT RECOGNIZE A SOVEREIGN RIGHT TO OWNERSHIP OF THE SEABED OF THE OUTER CONTINENTAL SHELF

The defendant States' principal claim here rests upon their status as successors to the rights of the American colonies. Prior to the American Revolution, the colonies bore allegiance to the British crown and were subject to British law. Accordingly, they held no rights not recognized by British law. Thus, if, as the Special Master determined (Report, pp. 25–47), British law did not recognize sovereign ownership of the

seabed of the outer continental shelf, *a fortiori* the colonies had no such ownership right.

Defendants at the outset assert that the Special Master, in reviewing the history and development of British maritime law, used an "[e]rroneous [m]ethodology" (see C.C. Br. 35–36) because he "tested the evidence and exhibits by what [he] believe[s] to be the most reliable account of the history of the English claims to sovereignty of the sea in the period under discussion, namely, the work of the English scholar, Professor T. Wemyss Fulton, *The Sovereignty of the Sea* (1911)." Report, pp. 25–26. The Special Master's use of Fulton's text was entirely proper. In the first place, it is clear that, contrary to defendants' contention, the Special Master studied the primary source materials offered in evidence and did not rely exclusively upon secondary materials. See Report, pp. 24, 26. Second, Fulton drew upon most, if not all, of the relevant primary evidence introduced by defendants, and the Special Master was entitled to compare his own preliminary understanding of that evidence with the views expressed by Fulton and others. And third, as the Special Master noted (*ibid.*), Fulton's work is generally regarded as perhaps the single most authoritative study of pre-nineteenth century English maritime claims.[12] In short, the Special Master's methodology was proper, and, as we now show, his conclusions were correct.

[12] Indeed, defendants' chief witness, Professor Philip C. Jessup, praised the Fulton work (see Report, p. 26), and defendants have relied upon Fulton as an important secondary source throughout this litigation.

1. The Crown Held No Property Right In The Seabed Prior To 1603

The Special Master correctly determined (Report, pp. 27–29) that although England exercised a protective jurisdiction in the neighboring seas for the safeguarding of commerce, the Crown made no claim to a property right to the seabed prior to the Stuart accession in 1603. See generally Open. Br. 37–52; Reply Br. 12–24.[13] It is well established that prior to the seventeenth century, the seas were treated under British law, as under Roman law, as *res communes*, free and open to all. Open. Br. 40–41, 50–51; Reply Br. 13.

Defendants' contentions to the contrary are based in large part upon a confusion between maritime sovereignty and seabed ownership. As both the Special Master and the defendants indicate, there is an abundance of evidence that England claimed a limited "sovereignty" over the adjacent seas for the purpose of excluding pirates and protecting commerce and navigation; but the evidence shows that this protective sovereignty did not embrace a Crown claim to ownership of the nearby seas in a property sense.

Defendants claim that the seas were within the realm of England and therefore part of the territory of the crown. But the seas were never considered within the realm under British law. Indeed, a statute

[13] "Open. Br." refers to our opening post-trial brief before the Special Master; "Reply Br." refers to our reply brief before the Special Master; "Response" refers to our response to the rejoinder brief of the Common Counsel States before the Special Master.

of 1389, 13 Rich. 2, c. 5, expressly provided that the admiral shall "not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea." This statute, together with 15 Rich. 2, c. 3 (1391) and 2 Hen. 4, c. 11 (1400), has long been understood by English lawyers as circumscribing the English realm, in a property-law sense, by inland waters and the low-water line. See Open. Br. 78–82.[14] English, Canadian, and Australian courts have so determined. *Regina* v. *Keyn*, L.R. 2 Exch. Div. 63; *Re Offshore Mineral Rights of British Columbia*, [1967] Can. L. Rep. 796, 65 D.L.R. (2d) 353; *Bonser* v. *LaMacchia*, 43 Aust. L.J. Rep. 411.[15]

[14] Moreover, English law sharply distinguished between inland waters (*e.g.*, rivers, ports, and bays) and the adjacent seas; property rights historically were recognized in inland waters but not, prior to the Stuart era, in the open sea. See Open. Br. 79–82; Reply Br. 17, 34–35 n. 14; Response 2–3.

[15] As is developed more fully below (see pp. 25, 30–31, *infra*), *Regina* v. *Keyn* is a decision of major significance to this case. It was decided by the Court of Crown Cases Reserved, an appellate court subject to review only by the House of Lords. The issues decided in *Keyn* were (1) that under common law the territory of England historically had ended at the low-water mark, and therefore the common law courts had no jurisdiction over crimes committed in the adjacent seas, and (2) that the jurisdiction of the Admiral did not extend, except in cases of piracy or other interferences with commerce or navigation, to foreign nationals on foreign ships. The latter holding was legislatively revised by the Territorial Waters Jurisdiction Act of 1878, which authorized the Admiral to assert a general criminal jurisdiction in the three-mile territorial sea, but only in cases where the assent of the Foreign Office had been obtained. See Response 4–5. Subsequent to *Keyn* it became generally recognized that the coastal state may claim ownership of the seabed of its adjacent territorial sea. See Report, p. 46. But that later development does not affect the

In particular, the *Keyn* case held that the admiral's jurisdiction historically had not been plenary, as would have been true if the Crown had possessed full territorial sovereignty over the sea, but instead had been narrowly restricted to piracy and other matters affecting the safety and security of British subjects and vessels. It was a purely protective jurisdiction exercised in support of the Crown's protective sovereignty. Moreover, this jurisdiction was not geographically exclusive; the nations bordering the "English seas" shared a protective jurisdiction in order to protect fishing and navigation by all in those seas. See Open. Br. 47, 73 n. 5. Thus, contrary to the inference defendants attempt to draw (C.C. Br. 31–32), England's admiralty jurisdiction bore no relation to any territorial claim. See generally Open. Br. 43–47; Reply Br. 20–23.

In asserting that the Crown claimed territorial ownership of the sea, defendants principally rely (C.C. Br. 32–33; S.S. Br. 21) upon English enforcement of the "flag salute" and alleged regulation of fishing and upon the Crown's prerogative rights to royal fish,

validity of *Keyn's* historical analysis. Defendants incorrectly assert (C.C. Br. 93) that *Keyn* was repudiated by this Court in *Manchester* v. *Massachusetts*, 139 U.S. 240, and by the Privy Council in *Secretary of State for India* v. *Chelikani Rama Rao*, 43 L.R. Ind. App. 192. This Court in *Manchester* v. *Massachusetts* merely observed that *Keyn* did not deprive the coastal state of authority to regulate fisheries in the territorial sea; we have never contended otherwise. *Chelikani Rama Rao* involved emerged lands (islands) within the three-mile territorial sea; it has long been understood, as we show below (pp. 26, *infra*), that such islands may be claimed by the sovereign as ownerless property, and *Keyn* was not to the contrary.

flotsam, jetsam, lagan, and its claims to derelict or emerged lands. But, as the Special Master pointed out, the "flag salute" was merely an attribute of protective jurisdiction that was "required to enable the king's officers, who were patrolling the sea in order to maintain the security of navigation, to ascertain the true nature of the foreign vessel, whether it was a peaceful trader or a pirate." Report, p. 28. See Open. Br. 41–42; Reply Br. 16–17. Similarly, the Crown's prerogative rights were not indicia of ownership of the sea or seabed itself but merely examples of the Crown's overriding rights in ownerless property found by its subjects. See Open. Br. 48–52, 147–148; Reply Br. 13–14, 23–24. There is no evidence of Crown grants of exclusive fisheries after 1215.[16] The jurisdiction exercised by the Crown over fishing after that date—except with respect to weirs in tidewaters close to shore—related to rivers, bays, and other inland waters. See Reply Br. 15–16. These regulatory activities are not evidence of a claim of control over or ownership of the outlying seas and the lands beneath them.

In summary, the law of the older legal tradition was that stated by Plowden in 1575 (quoted in Moore, *A History of the Foreshore* 229 (3d ed., 1888)):

> * * * although the Queen has jurisdiction in the sea adjoining her realm, still she has no property in it, nor in the land under the sea, for it is common to all men, and she cannot prohibit any one from fishing there * * *. And also

[16] Indeed, as defendants properly concede (C.C. Supp. Br. 40, n. 14), the Crown had no power to grant exclusive fisheries after Magna Carta.

> Bracton says * * *: If an island is born in the sea, which rarely happens, it belongs to the occupant; and with this Britton agrees; which proves that the Queen has not property in the sea nor in the land under it."[17]

As Professor Samuel Thorne testified before the Special Master (Open. Br. 50):

> English law in that period reflected the Roman law view which, while recognizing some kind of jurisdiction in the adjacent seas, denied a property in them. There is no trace of any English claim to ownership of the sea or seabed.

2. The Crown Asserted Broad Claims To The Seabed During the Stuart Era (1603–1688), But These Claims Were Abandoned Prior To 1776

The Special Master's findings (Report, pp. 29–47) concerning seventeenth- and eighteenth-century British maritime claims may be summarized as follows. Before the accession of the Stuarts, the Crown had asserted only a protective sovereignty over the adjacent seas and had made no claims to the seabed. During the Stuart era (1603–1688), the Crown asserted general sovereignty over the English seas, including an incidental claim to the ownership of the seabed, based upon its effective naval control of those seas.

The Stuart era proved to be the high tide of British maritime pretensions. During the eighteenth century,

[17] Plowden expressly rejects Thomas Digges' partially contrary view—that the Queen would own islands born in the sea—as based upon a misreading of Bracton. See Open. Br. 50–51. In any event, Digges, upon whom defendants rely (C.C. Br. 33), ultimately based his theory on the Crown's overriding rights in ownerless property, not upon a theory of Crown ownership of submerged lands. See Open. Br. 48–49; Reply Br. 24.

British maritime policy substantially reverted to the historic assertion of a protective sovereignty over the surrounding seas, with only a limited claim to certain fisheries based upon occupation and use. The Crown abandoned all general territorial claims to those seas and seabeds. That was the state of British law in 1776.

During the late eighteenth and early nineteenth centuries international law gradually came to recognize that each coastal state was entitled to exercise protective sovereignty over the three-mile marginal sea.[18] But throughout the eighteenth century, seabed ownership was and could be claimed only on the basis of appropriation through occupation and use. Only later, during and after the latter part of the nineteenth century, did the three-mile limit *per se* become a basis for claims of territorial sovereignty comprehending seabed ownership.

a. The Special Master determined (Report, pp. 29–40) that during the Stuart era (1603–1688) the Crown claimed "ownership of the bed of the narrow seas adjacent to the coasts of Great Britain and Ireland." Report, p. 35. All parties accept this determination as correct. The defendant States quarrel, however, with the grounds on which that determination rests. See C.C. Br. 38–54; S.S. Br. 20–26.

The Special Master concluded on the basis of the evidence presented that the Crown's maritime claims

[18] Britain's adoption of this concept represented a final contraction of the maritime area over which it had historically claimed protective sovereignty.

during the Stuart era were based upon effective occupation of the seas through British naval power. We believe that conclusion is correct for the reasons stated in the Special Master's Report. Defendants' contrary position—that the Crown's claims were based upon a general theory of inherent sovereign ownership in the coastal state—has no historical foundation. It is indeed refuted by the very extravagance of the Stuart claims to the Bay of Biscay and the North Sea, which denied to France, Spain, and the North Sea nations any corresponding sovereign maritime rights. Moreover, as we show, defendants' objections to the Special Master's reasoning are without merit.

i. The Special Master correctly concluded (Report, p. 35) that, during the period relevant to this litigation, the adjacent seas were never considered to be within the realm of England. Indeed, we have already shown (pp. 23–24, *supra*) that until at least the end of the nineteenth century, the realm of England was always understood as ending at the low-water mark.[19]

[19] Defendants question (C.C. Br. 39–41) the Special Master's reliance upon Sir Henry Finch's *Law, or a Discourse Thereof*, a work written during the Stuart era that carefully analyzed English statutes and concluded that the realm of England at that time did not extend beyond the low-water mark. We believe that the Special Master cited Finch's work, which was "much the most complete and best institutional book before Blackstone" (1 Holdsworth, *A History of English Law* 548 (1936)), as merely the earliest of the many legal works that so define the English realm. See the authorities cited at Open. Br. 78–82, and Reply Br. 17–20. Moreover, defendants' heavy

ii. Related to the Special Master's determination regarding the extent of the English realm is his finding (Report, pp. 31–32) that admiralty jurisdiction during the Stuart era was protective rather than "territorial," *i.e.*, that it extended only to matters affecting the safety and security of navigation and commerce and did not purport generally to enforce British civil and criminal law throughout the area of the English seas. The Special Master's finding is solidly grounded in English law. As the Special Master explained (Report, p. 32; footnote omitted):

> In the case of *The Queen* v. *Keyn,* [1876–77] L.R. 2 Exch. Div. 63, the English Court for Crown Cases Reserved decided in 1876 that the English courts of admiralty did not have territorial jurisdiction to try a foreigner for a crime committed on a foreign ship on the high seas even though the ship at the time the crime was committed was within what had then become recognized as the three-mile belt of territorial sea. Lord Chief Justice Cockburn in his scholarly opinion in that case demonstrated that the courts of admiralty had never up to that time had such jurisdiction.

Defendants argue here (C.C. Br. 41–44; S.S. Br. 21) that the court in *Regina* v. *Keyn, supra,* misconstrued

reliance (C.C. Br. 40) upon the *Ship Money Case* is misplaced. See Reply Br. 29–30. Indeed, of the many authorities cited by defendants, only one—Selden, *Of the Dominion of the Seas* (Nedham Transl., 1652)—actually contended that the realm of England extended beyond the low-water mark in a general property sense. See Reply Br. 31–34. His view was of course decisively rejected in *Regina* v. *Keyn, supra.*

English law. But, as we showed before the Special Master, the authorities upon which defendants rely are consistent with the *Keyn* decision and do not support defendant's exaggerated description of seventeenth-century admiralty jurisdiction. See Open. Br. 44–47, 66–77; Reply Br. 24–28. The Special Master correctly concluded "that the evidence offered by the defendant States is not sufficient to rebut the correctness of [*Regina* v. *Keyn*] * * * [and] that the jurisdiction of the English courts of admiralty in the seventeenth and eighteenth centuries was not based upon a territorial concept." Report, p. 32.

iii. Defendants principally object (C.C. Br. 47–54; S.S. Br. 23–26) to the Special Master's finding that the Crown's maritime claims during the Stuart era rested upon "effective occupation through its naval power." Report, p. 35. But the authorities supporting the Special Master's finding are legion. Thus both Selden and Hale, upon whom defendants otherwise extensively rely, understood and explicitly stated that effective occupation was the necessary legal basis of maritime sovereignty. See Open. Br. 62–65, 86–87, 90–91, 101–102; Reply Br. 31, 36, 44.[20] Other English legal authorities of the day were in agreement with that view. See Open. Br. 100–103, 113–115. Indeed, no English authority has based the Crown's claims to sovereignty over the open seas on any theory other

[20] Defendants conceded before the Special Master that Selden's support of the Crown ownership of fisheries was "based * * * largely on a doctrine of prescription, appropriation or occupation." C.C. Supp. Br. 88.

than that of prescription and occupation. See Reply Br. 43–47.[21]

Defendants repeatedly but wrongly claim that English authorities of the time asserted a 100-mile theory of coastal maritime sovereignty. See, *e.g.*, C.C. Br. 47–50; S.S. Br. 6–7, 33–34. No English treaties of the period ever propounded a theory of automatic sovereignty in the coastal state. See Open. Br. 59–66, 113–115; Reply Br. 46, n. 22. Defendants' evidence pertaining to legal writers shows only that during the Stuart era Albert Gentili, a professor of international law, made an argument based upon that theory before the English Prize Court; in that case the court rejected Gentili's argument and held that even the adjacent English seas were outside the dominion of the Crown; in doing so, the Prize Court decisively rejected the notion of full territorial sovereignty upon which defendants rely. See Reply Br. 53–54.

Defendants' alternative reliance (C.C. Br. 51–52) upon the doctrine of merely symbolic occupation is misplaced. That doctrine applied solely to newly discovered lands and had only a limited application even there. See Reply Br. 47–50. Defendants offer no authority—and there is none—for their assertion (C.C. Br. 52; emphasis in original) that "[t]he criteria for sovereignty in the sea and seabed have always been substantially *less* stringent than as to land areas." In

[21] The Special Master's additional citation of non-English authorities on international law merely provides a supplement to and confirmation of the well-established English view; defendants err in suggesting (C.C. Br. 49, n. 33) that the Special Master ignored English law in favor of international law.

fact, the opposite is true. Since a claim of sovereignty over the open seas necessarily infringes upon international commerce and the rights of the community of nations to navigation and fishing, the requirements for effective occupation of the seas have always been more stringent than those for occupation of newly discovered lands. See Reply Br. 50–51.

b. The Special Master found that during the eighteenth century the broad Stuart pretensions to seabed ownership were abandoned and British maritime policy reverted to the assertion of only a protective sovereignty over the adjacent seas. Defendants' contentions to the contrary (C.C. Br. 55–62; S.S. Br. 17–21) rest in large part upon evidence that Britain continued to demand the flag salute.[22] But by the eighteenth century the flag salute, which was in any event "based on naval power and not * * * upon any claim of the right of ownership of the sea" (Report, p. 33), had become largely ceremonial. See Report, p. 41.

Defendants also contend that Britain continued to claim exclusive fisheries and to regulate foreign fish-

[22] Defendants also rely (C.C. Br. 56–57; S.S. Br. 11) upon generalized statements by eighteenth-century authorities concerning British maritime "sovereignty" and "dominion." But those authorities were all speaking of the protective sovereignty the Special Master found had been asserted, not of a territorial or proprietary sovereignty. See Open. Br. 58–68, 93–95; Reply Br. 26–27, 32, 39–42. Moreover, although Blackstone recognized the Stuart theory of seabed ownership as a possible basis for a Crown claim of ownership of emerged lands (see C.C. Br. 58), he was uncertain of the soundness of that theory. See Open. Br. 95.

ing throughout the adjacent seas. But the evidence is not sufficient to establish that Britain either claimed exclusive fisheries or effectively regulated foreign fishing beyond three miles from shore during the eighteenth century. Defendants' evidence concerning the regulation of foreign fishing (see C.C. Supp. Br. 131) appears to pertain to inland waters or shallow coastal seas. And defendants' witness Professor Jessup has shown that Britain claimed no exclusive fisheries beyond three miles from shore at the end of the eighteenth century. See Open. Br. 228–231. In any event, a Crown claim to exclusive fisheries would have been based upon appropriation of those fisheries through occupation and use, not upon a theory of territorial ownership. See Open. Br. 37, 41, 59–66; Reply Br. 27–28. Moreover, exclusive-fishery claims would not imply seabed ownership. As the Special Master observed, "while claims to wide expanses of seabed began with the Stuart kings and ended after their departure, intense interest in ocean fisheries goes back into antiquity and continues to the present day." Report, p. 39. Similarly, the mere regulation of fisheries would have constituted only an exercise of protective jurisdiction. See Report, p. 44.

Defendants contend (C. C. Br. 59) that the eighteenth century authorities recognized "exclusive national interests in territorial waters approximately 100 miles in width."[23] That contention is without

[23] They also contend (C.C. Br. 59) that the narrower three-mile limit that developed during the course of the eighteenth century was "proposed almost entirely for neutrality purposes". These contentions are, of course, mutually inconsistent. See

merit. No nation either claimed or recognized claims of 100-mile territorial jurisdiction during the eighteenth century. See Open. Br. 225–227; Reply Br. 46–47, 173. The 100-mile theory upon which defendants rely throughout their briefs was never understood as a theory of automatic territorial ownership in the coastal state; indeed, it was originally conceived merely as the geographical extent of a coastal state's obligation to curtail piracy, but it was never sanctioned in that or any other form by the usage of nations. See Reply Br. 46.

Defendants' final contention (C.C. Br. 60–62), that the Special Master's findings rest upon an "artificial theory of hiatus" in legal development, is based upon a misreading of the Report. They appear to interpret the Special Master as suggesting that Britain first renounced all claims in and jurisdiction over the seas at some point during the eighteenth century and then reasserted those claims within the marginal sea upon the adoption of the three-mile rule. But it is clear from the Special Master's Report that he recognized that Britain had asserted protective maritime jurisdiction throughout the entire eighteenth century. To recapitulate, the Report traces the following history: (1) as to seabeds, (a) the Crown claimed no seabeds

Reply Br. 161–170, 173–175, 181. As Professor Henken testified before the Special Master (Tr. 2602):

> If you are talking about territorial sovereignty, it must include everything, including neutrality. So, if a state was claiming only three miles for neutrality, it obviously was not claiming territorial sea beyond that because it wasn't claiming neutrality beyond that.

before the accession of the Stuarts; (b) the Stuarts made extensive claims to seabed ownership, but these claims, except as to sedentary fishing beds that had been acquired through occupation and use, were abandoned shortly after the end of the Stuart era; (c) no general claims of seabed ownership were again asserted until long after 1776, and the new claims were based upon and limited by the three-mile territorial sea; (2) as to surface jurisdiction, (a) the Crown asserted only a protective sovereignty prior to the Stuart era; (b) the Stuarts asserted general sovereignty over the English seas; (c) after the end of the Stuart era, Britain reverted to a policy of protective jurisdiction; and (d) the maritime area over which that protective jurisdiction was asserted gradually shrunk from the extensive seas claimed by the Stuarts to the currently-accepted three-mile territorial sea. The only "hiatus" in this history, and it is by no means "artificial," is the period of extravagant Stuart pretentions, pretentions that lacked any basis in British or international law and that disappeared "without * * * leaving a single juridical or international right behind * * *." Report, p. 40.

B. THE ENGLISH CHARTERS ESTABLISHING THE AMERICAN COLONIES DID NOT GRANT OWNERSHIP TO THE SEABED OF THE OUTER CONTINENTAL SHELF

1. The Special Master correctly determined (Report, pp. 47–56) that in establishing the American colonies the Crown did not intend to, and did not, grant ownership to the seabed of the outer continental shelf. See generally Open. Br. 104–137;

Reply Br. 61–88. Defendants' contrary contentions are based upon a pervasive misunderstanding of seventeenth- and eighteenth-century British law and a resultant misreading of the colonial charters.

Defendants' pricipal argument (C.C. Br. 63–66, 81–84) is that in view of the "legal and political climate" of the seventeenth century, a failure to grant seabed rights to the colonies would have been "incredible." This argument is based upon the erroneous and unhistorical premise that Britain in the seventeenth century claimed, and recognized, an automatic maritime territorial sovereignty in the coastal state. As we have already shown (pp. 31–33, *supra*), British maritime pretensions during the Stuart era were based not upon a theory of inherent territorial sovereignty but upon occupation through naval domination. Defendants have offered no evidence that Britain had achieved an effective naval occupation of the Atlantic Ocean off the coast of North America at the time the colonial charters were granted. Nor have defendants produced any evidence of official action by the Crown or its representatives recognizing or asserting a claim of sovereignty to the seas adjacent to the American colonies. Indeed, the fact is that although during the period of the colonial grants there was an aggressive assertion of English claims to the English seas, Britain paid little or no attention to, and expressed little or no interest in claiming sovereignty over, the American seas. See Reply Br. 61–64. Accordingly, the Crown's failure to convey ownership of the adjacent seas and seabeds is not merely credible—it is

a necessary consequence of the fact that those rights simply were not within the gift of the Crown.[24]

The charter language upon which defendants rely (C.C. Br. 68–75; S.S. Br. 26–37) does not grant territorial ownership of the sea or seabed; it grants "Lands * * * all along the Sea Coast" and "Islands lying within one hundred Miles along the Coast," together with "Royalties, Privileges, [and] Franchises * * * within the said Territories, and Precincts thereof, whatsoever, and thereto and thereabouts both by Sea and Land * * *." C.C. Br. 68–69. In short, the American colonial charters granted lands and islands outright,[25] but granted only certain rights, short of ownership, in the seas. By contrast, the Canadian colonial charters purported to make outright grants of the sea.[26] Thus, the 1610 charter of Newfoundland conveyed "the *seas and islands* lying within ten leagues of any part of the sea coast of the country aforesaid" (C.C. Supp. Br. 189; emphasis added); and the 1621 grant of Nova Scotia conveyed "*islands or seas* lying near or within six leagues from any part of [the mainland] * * *" (*ibid.*; emphasis added). These Canadian charters were granted during the same period as the American charters on which defendants rely. Yet the Crown abstained from specifically granting the sea or seabed in any of the charters at issue in this litigation. The absence of any explicit grant of the seas or seabeds in the American colonial charters clearly indicates that no such grant was contemplated, intended, or made.

[24] Defendants also claim (C.C. Br. 66–67; S.S. Br. 40–41) that the objectives of British colonization required that the colonies be granted seabed rights. This claim is not supported by the evidence. To the contrary, there were no valuable fisheries off the Atlantic Coast south of Massachusetts. See generally Open. Br. 113–115, 141–146; Reply Br. 43–47, 63–64, 90–100.

[25] Contrary to defendants' contention (C.C. Br. 76–78, 81–84; S.S. Br. 47–50), it is clear that a grant of all islands within a certain distance of shore did not convey the intervening seas. See generally Open. Br. 117–126; Reply Br. 70–74.

[26] The Crown claimed the rich fisheries of the Canadian seas on the basis of occupation and use. See Reply Br. 63–64.

Defendants perforce rely (C.C. Br. 73–75) upon the conveyance of "Royalties, Privileges, [and] Franchises" as a conveyance of the seas and the seabed. But those terms were never understood as including sovereignty or ownership of seas, seabed, and subsoil; they refer only to the Crown's prerogative rights of royal fish, wreck, treasure trove, and so forth. See Open. Br. 116–117; Reply Br. 65–66; Response 5–7. They encompass rights in the sea, but they do not include ownership of the sea. The Special Master properly concluded (Report, p. 50):

> * * * [T]o hold that by the use of the word "royalties" in these colonial charters the crown conveyed full sovereignty and dominion over the adjacent seas and ownership of the seabed and its resources is to load that single word with far more cargo than it can be asked to carry. Moreover, if the charters did actually grant ownership of the adjacent sea it would not have been necessary for them expressly to convey harbors, havens, ports, bays, inlets and creeks of the sea, as well as fisheries, as was done in one form of words or another in most of them.

It is, moreover, clear that even if "royalties" could be understood as comprehending a property interest in the sea or seabed, a grant in such general terms would not have sufficed to convey the rights claimed by

defendants here. Royal grants made in general terms, such as "royalties" and "franchises," did not pass particular prerogatives not specifically enumerated. See generally Open. Br. 126–128; Reply Br. 66–67. For example, as the Special Master pointed out, the Attorney General and the Solicitor General of England in 1723 opined that "the charters of New Jersey did not grant royal mines even though the granting clauses included the general terms 'mines', 'minerals' and 'royalties'." Report, p. 50.[27] Accordingly, since the charters on which defendants rely specifically enumerated many prerogatives, such as fishings and precious stones, but did not specifically enumerate ownership of the seas or seabed as a prerogative, such ownership did not pass to the colonies.[28]

The Special Master correctly rejected defendants' argument (C. C. Br. 79–81) that their position is supported by maps from the colonial period. See Report, 54–55. The official maps of the period show that the territories of the colonies did not extend into the sea. See Reply Br. 59–60. Maps designating offshore seas by reference to the name of the neighboring

[27] This opinion illustrates that, defendants' contention to the contrary notwithstanding, the same strict rule of construction applied to all royal grants, whether in the form of governmental charters or private gifts. See Open. Br. 126–127; Response 5–6.

[28] Defendants' reliance (C.C. Br. 78–79) upon the charters' free-fishing clauses is misplaced. Those clauses, which apparently applied only to tidewaters, bays, inlets, and other inland waters (see reply Br. 85), suggest at most only that in their absence the colonies might have attempted to assert a power to regulate fishing. A claim of such regulatory power would not have encompassed a claim of seabed ownership.

colony (*e.g.*, the "Virginia Sea") were uncommon and could in no event indicate a claim of sovereignty. (The logic of defendants' argument to the contrary implies that Mexico claims sovereignty over the Gulf of Mexico, and India over the Indian Ocean.)

2. The Special Master also correctly determined (Report, pp. 56–60) that the evidence of colonial maritime activities does not support the defendants' claim that the colonies had been granted ownership of the seabed of the adjacent seas. The Special Master found that the defendants had failed to present any evidence that the colonies even claimed exclusive fisheries more than three miles from shore; that the limited evidence of fishing nearer the shore was not sufficient to establish that the colonies had acquired ownership of the seas and seabed through occupation and use; and that "colonial legislation relating to fisheries was based on the control which the colonies exercised over their own residents or on their control of activities on or close to their shores or in inland waters." Report, p. 57. The record amply supports these findings. See generally Open. Br. 137–154; Reply Br. 89–108; Response 9–10.

Defendants apparently concede that there is only scant evidence of American colonial maritime activities, and presumably for that reason they principally rely upon evidence relating to the Canadian fisheries. See C.C. Br. 84–87; S.S. Br. 41–42. But the evidence upon which defendants rely shows only that the Canadian colonists, unlike the American colonists, had an incentive to claim their adjacent seas, or the fisheries

therein, through occupation and use and attempted to do so. See Open. Br. 141–146; Reply Br. 58, 63–65, 90–92. Defendants' burden here is to offer evidence corroborating their claims of American colonial seabed ownership. They do not carry that burden by asking this Court to speculate about the evidence of appropriation that might have been available if the American colonial fisheries had been as rich as those in Canada.[29]

The limited evidence of American colonial fishing (see, *e.g.*, S.S. Br. 37–43) pertains exclusively to inland and shallow coastal waters. See Open. Br. 138–146; Reply Br. 74–79, 86–87, 90–100; Response 9–10.[30] Moreover, that evidence does not establish that such fishing was sufficiently intensive to effect an appropriation, through occupation and use, even of those waters. But it would not in any event avail defendants to show an occupation of shallow coastal waters. Their claim here is to ownership of the seabed of the distant, outlying continental shelf. A mere showing that one

[29] Nor do they carry that burden by asserting an absence "of foreign exploitation of marine resources in the marginal seas" (C.C. Br. 84–85), especially since they themselves concede (C.C. Br. 86) that there were no resources rich enough to attract foreign exploitation. But there is in fact evidence that the Massachusetts colony customarily permitted foreigners to fish even in its inland waters. See Reply Br. 86–87, 92–93; Response 8–9.

[30] Similarly, the evidence of colonial claims to derelict or emerged land (see C.C. Br. 87) relates only to lands in rivers, bays, and other inland waters. See Reply Br. 99–100. Moreover, as the Special Master indicated (Report, p. 58), even claims to emerged lands in the sea would not have been based upon a theory of ownership of the submerged seabed.

or more of the American colonies had effected an appropriation of coastal fisheries at points along their shores—a showing not made here—could at most establish colonial ownership of portions of what is now the three-mile territorial sea.[31] The defendants were granted the seabed of the entire territorial sea by the Submerged Lands Act, and historic ownership of that narrow stretch of seabed is no longer at issue. The important point here is that sovereign ownership of the seas could be achieved, if at all, only through occupation and use (see pp. 31–33, *supra*), and there is no evidence of such occupation and use in the area of the seas now at issue.

The Special Master correctly determined (Report pp. 56–57) that the New England fishing controversy, leading to the Privy Council orders of 1620–1621, illustrates the absence of any charter grant of seabed ownership or even of exclusive fishing rights. The Council of New England asserted that it was entitled to an exclusive fishery, whereas the Virginia Company claimed a general right of free fishing on the theory that the seas were free and common to all; the Privy Council upheld Virginia's claim.

[31] Defendants suggest (C.C. Br. 87) that a finding of colonial ownership of portions of the three-mile territorial sea on the basis of occupation and use would undermine the *California* rationale. We disagree. California's claim was that the thirteen original states had possessed inherent territorial sovereignty over the entire three-mile territorial sea; California would not have been entitled to any rights in the territorial sea merely upon the basis of a showing that one or more of the thirteen original states had specific and limited claims based upon occupation and use.

Reply Br. 62 n. 27, 96. Shortly thereafter, the New England colony and its successors abandoned all exclusive fishing claims. See Reply Br. 93–96.[32]

The absence of substantial evidence suggesting colonial dominion or control over the adjacent seas is unsurprising. The colonial governments themselves, in negotiations over boundary disputes, acknowledged that the colonial boundaries ran along the coastline, not into the sea. See Open. Br. 131–135. Colonial governors, in reports to the Crown, described the colonial boundaries in like terms. See Open. Br. 136–137.

3. Finally, even if it were assumed *arguendo* that British law recognized sovereign ownership of the seabed of the outer continental shelf adjacent to the American colonies and the colonies had been granted such ownership in their charters, that ownership would have reverted to the Crown before independence.[33] By 1754, all the colonies, except Massachusetts, Rhode Island, and Maryland, had become royal colonies whose vacant, unappropriated lands had reverted to the Crown. See Open. Br. 156–160. Moreover, the Crown repeatedly disposed of vacant and unappropriated lands of the colonies without regard to the boundaries set out in the original grants and charters. Open Br. 163–164. Thus even a charter grant of lands was deemed ineffective in the absence of appropriation.

In short, the charters did not in practice grant proprietary interests; rather, they granted opportunities to establish settlements and appropriate lands, together with sufficient authority to make laws for the peace, order, and good government of those settlements. Accordingly, any rights to the adjacent seas and seabed that passed under the grants and charters did so as incidents of government. Open. Br. 165–169. And all colonial governmental powers had reverted to the Crown before independence. Open. Br. 169–174. See also Reply Br. 109–115.

C. EVEN IF THE SEABED OF THE SEAS ADJACENT TO THE AMERICAN COLONIES HAD BEEN SUBJECT TO A CLAIM OF SOVEREIGN OWNERSHIP IN 1776, THAT OWNERSHIP WOULD HAVE PASSED TO THE UNITED STATES AT INDEPENDENCE OR UPON RATIFICATION OF THE CONSTITUTION

We have already shown that in 1776 British law did not recognize sovereign ownership to the seabed of the outer continental shelf adjacent to the American colonies and that the colonies themselves were not in any event vested with such ownership. We now show, as the Special Master correctly determined (Report, pp. 60–65), that even if the Crown or the colonies had been vested with such seabed ownership at the

[32] Defendants' reliance (C.C. Br. 89) upon enactment of the New England Restraining Act of 1775 is misplaced. That Act, which was a retaliatory measure taken at the outset of the Revolutionary War, purported to prohibit the New England colonists from fishing in their adjacent seas, and therefore violated the colonial charters that granted that right. Nothing in the debate leading to passage of the Act supports defendants' theory that the colonists' fishing rights were exclusive. Nor does that Act, which was based upon Britain's naval power to blockade the colonies, evidence a Crown claim of proprietary interest in the sea or seabed.

[33] The Special Master did not find it necessary to consider this contention. See Report, p. 55.

outset of the American Revolution, that ownership would have passed to the United States either at independence or upon ratification of the Constitution.

1. Ownership of the seabed of the seas adjacent to the American colonies at the outset of the Revolution would have passed directly to the United States, and not to the separate states, at independence. The United States was created upon independence as a single nation and was recognized as such under international law; accordingly, any seabed ownership rights previously held either by the Crown or by the colonies would have passed to the United States as an incident of external sovereignty. See generally Open. Br. 176–209; Reply Br. 116–160. Defendants' contentions to the contrary (C.C. Br. 94–101; S.S. Br. 43–55) are not supported by the weight of the evidence and have been rejected in principle by this Court in a line of decisions beginning in the eighteenth century.

The defendant States in large part rely upon a claim of individual sovereignty from and after independence.[34] We have never denied that the states exer-

[34] Defendants also appear to suggest (C.C. Br. 96–97) that they could have possessed "property rights" in the seabed apart from any charter claim of sovereignty over the sea. But the witnesses before the Special Master and the authorities offered in evidence were in agreement that under English law inherent territorial rights in the seabed—the kind of rights claimed by the defendant States here—could be claimed only as an incident of sovereignty. See Reply Br. 139 n. 70; Response 6–7. Specific property rights in the seabed could be appropriated on the basis of occupation and use, but the Special Master expressly found that the colonies had not achieved any such appropriation beyond the three-mile territorial sea. See Report, pp. 58–60.

cised internal sovereignty upon independence; indeed, they continue to do so. But the crucial point is that the states were never external sovereigns under international law. The history of the Continental Congresses shows that a national government possessing the attributes of sovereignty came into being prior to the states. See Report, p. 60; Open. Br. 176–184; Reply Br. 116–137. In recognition of that fact this Court has repeatedly held that the United States was the only external sovereign that emerged from independence. See Open. Br. 184–190; Reply Br. 123, 132–137. Thus in *Penhallow* v. *Doane,* 3 Dall. 54, the Court held that New Hampshire had not possessed, during the Revolutionary War, the admiralty jurisdiction incident to external sovereignty. Justice Paterson observed (3 Dall. at 81):

> The truth is that the states, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now; the states collectively, under congress, as the connecting point or head, were acknowledged by foreign powers as sovereign * * *.

Similarly, in *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 316, this Court determined that the governmental powers associated with external sovereignty passed directly from the British Crown to the United States and not to the individual states:

> As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the

colonies in their collective and corporate capacity as the United States of America.[35]

That determination is fully supported by the history of American diplomacy from 1776 to 1783, which shows that the thirteen original states were not accorded, and did not claim, separate international recognition. See Open. Br. 190–193.[36] It is also supported by the congressional assertion of war, admiralty, treaty-making, and other powers of external sovereignty during that period. See Open. Br. 196–200.[37]

[35] Defendants assert (C.C. Br. 95–96) that *Curtiss-Wright* has been criticized by commentators and repudiated by the Court. But the criticism has been levelled not at the Court's determination that the national government succeeded directly to the attributes of external sovereignty but rather at the Court's discussion of the disposition of those attributes as between Congress and the President. See Reply Br. 132. Furthermore, this Court has never repudiated the historical analysis upon which we rely here. See Reply Br. 136–137.

[36] Defendants apparently concede that the 1783 peace treaty with Great Britain was negotiated on behalf of the United States, but they contend (C.C. Br. 99–101) that the treaty provision recognizing the United States' claim to all islands within twenty leagues of its coast implies individual State ownership of the intervening seabed. We see no basis for that contention, which was, as the Special Master noted (Report, p. 64), expressly rejected by this Court in *United States* v. *Louisiana*, 363 U.S. 1, 68. See also Reply Br. 155–160.

[37] Defendants incorrectly construe (C.C. Br. 96–98; S.S. Br. 56) the western lands controversy as evidence that the Revolutionary War was fought to vindicate individual colonial territorial claims. In fact, the peace-treaty negotiations for the western lands were conducted on behalf of the United States in collectivity and were based primarily on assertions of national rights to those lands. See Open. Br. 206–209; Reply Br. 155–157. Those states claiming western lands on the basis of their colonial charters were required to abandon their claims to the United States in a political compromise reached during the drafting of the Articles of Confederation. See Reply Br. 141–142. Thus the western lands were regarded as a national asset, not as the territory of particular states on the basis of individual charter claims.

Accordingly, even if it were assumed that sovereign ownership of the seabed adjacent to the American colonies had been recognized under the British law of the day, that ownership would have passed to the United States as an incident of sovereignty. See Open. Br. 90–92, 165–166, 193–196; Reply Br. 137–155. As the Special Master noted (Report, p. 63):

> This Court decided in *Martin* v. *Waddell*, 1842, 16 Pet. 367, and reaffirmed in *Massachusetts* v. *New York*, 1926, 271 U.S. 65, that rights to the soil under navigable waters inhere in the sovereign and pass to a new sovereign upon a transfer of sovereignty. While *Martin* v. *Waddell* involved inland waters in New Jersey and *Massachusetts* v. *New York* involved waters in Lake Ontario within the boundaries of New York, the principle which they annunciate is equally applicable to the soil under the territorial sea. *United States* v. *Texas*, 1950, 339 U.S. 707, 717. It necessarily follows that if the British crown, prior to independence, did claim sovereignty and dominion over the sea and seabed off the Atlantic coast beyond the territorial limits of the states that sovereignty and dominion passed after independence to the national government in which the powers of external sovereignty were reposed and not to the

defendant States. This result, moreover, is consonant with the doctrine of *United States* v. *California,* 1947, 332 U.S. 19, and the cases which followed it, that the possession of rights in the adjacent seas and seabed is an incident of that international or external sovereignty which, as I have found, was reposed in the national government from the time of independence.

2. But even if the United States had not achieved full external sovereignty in 1776, the sovereign right to ownership of the seabed of the outer continental shelf would have passed to the United States upon ratification of the Constitution. See Report, pp. 64–65. Article IV, Section 3, Clause 2 of the Constitution, upon which defendants principally rely (C.C. Br. 102–104; S.S. Br. 55–71), was not intended to affect the distribution of incidents of external sovereignty, such as an inherent sovereign ownership of the adjacent seas and seabed. Instead, the Constitution confirmed that the United States collectively possessed all attributes of external sovereignty. See Open. Br. 209–210; Reply Br. 160. Ratification of the Constitution completed a process of nationalization that vested in the federal government all external sovereignty, including the sovereign ownership of the adjacent seabed if in fact such ownership was then recognized under international law; and as we show below (pp. 51–55, *infra*), the federal government, acting on behalf of the nation as a whole, subsequently renounced any claim to ownership of the seabed of the outer continental shelf.

D. THE DEFENDANT STATES DID NOT ACQUIRE OWNERSHIP OF THE SEABED OF THE OUTER CONTINENTAL SHELF AT ANY TIME AFTER RATIFICATION OF THE CONSTITUTION

As we have shown above, at the time of the American Revolution British law did not recognize, and the Crown in its grants to the colonies did not claim or convey, sovereign ownership of the seabed of the outer continental shelf. We now show that, in any event, the adoption by the United States of a three-mile territorial sea foreclosed any state claims to the seabed beyond that limit and that the seabed of the outer continental shelf was affirmatively appropriated by the United States.

1. The Adoption By The United States Of A Three-Mile Territorial Sea Foreclosed Any State Claims To The Seabed Beyond That Limit

a. The defendants do not directly dispute the Special Master's finding that "[t]he United States very early in its national existence took a leading part in advocating and developing [the] concept [of] a three-mile belt of territorial sea within which the adjacent state could enforce neutrality and, as the doctrine developed later on, exercise virtually unlimited jurisdiction and sovereignty, subject to the right of innocent passage by peaceful foreign vessels, and beyond which the high seas were international waters open to all." Report, pp. 65–66. They contend, however, that the adoption of the three-mile rule did not divest them of an alleged pre-existing inherent sover-

eign ownership of the seabed beneath and beyond the territorial sea. See C.C. Br. 113–129; S.S. Br. 71–74.[38]

We have already shown that the defendant States had no such pre-existing ownership of the seabed of the outer continental shelf.[39] But even if, contrary to our showing, the individual states had held and retained ownership of the seabed following ratification of the Constitution, the subsequent adoption of and adherence to the three-mile limit by the United States would have terminated that ownership.[40] The three-mile limit became a customary rule of international law that limited the coastal nation's inherent territorial sovereignty in the adjacent seas and sea-

[38] We do not dispute defendants' claim (C.C. Br. 113–120; S.S. Br. 71–72) that the seabed of the outer continental shelf remained subject to ownership following adoption of the three-mile rule. It remained subject to appropriation on the basis of occupation and use, but defendants have failed to establish any such appropriation here. See n. 34, *supra*. It did not, however, remain subject to claims of inherent coastal sovereignty, the type of claim on which defendants principally rely.

[39] Defendants appear to suggest (C.C. Br. 113–116) as an alternative theory of recovery that even if they lacked sovereign ownership of the seabed, they nevertheless possessed an inherent sovereign right to the resources of that seabed. But it is clear that international law during the eighteenth and nineteenth centuries recognized no inherent rights in the resources of the seabed apart from ownership of that seabed itself. See note 34, *supra*.

[40] It is well established, and defendants' witness Professor Jessup conceded (Tr. 1141–1155), that the United States consistently adhered to the three-mile rule from the time of its adoption until the Truman Proclamation of 1945, which claimed the seabed of the outer continental shelf for the United States. See Open. Br. 211–218; Reply Br. 162–170. Defendants' statement to the contrary (C.C. Br. 113) is without basis.

bed; after that limit was adopted as a general principle of international law, claims to seas or seabeds beyond that limit could be based only upon effective occupation and use. See Open. Br. 228–234, 263–270. Reply Br. 173–175. Accordingly, no state claim of inherent territorial sovereignty over outlying seas or seabeds could have survived the adoption and enforcement of the three-mile limit by the United States as the supervening external sovereign. As the Special Master explained (Report, p. 68):

> * * * [T]he maintenance of sovereignty over [the territorial sea] has always involved the foreign relations and defense activities of the maritime state in a very special sense. Its extent and limits have been dependent upon the successful conduct by that state of its foreign relations and defense. Accordingly, even if we assume *arguendo* that the defendant States did acquire in some manner and continued to have jurisdiction and sovereignty over the marginal seas, the geographical extent and limits of that jurisdiction were necessarily subject to the actions of the federal government in defining the extent of the American territorial sea in the course of exercising the foreign relations and defense powers which the states had entrusted to it. As we have seen, the federal government did define those limits as three miles seaward of the coast and secured very general international acceptance of that definition. I am satisfied that by this action the federal government effectively limited to the three-mile belt any possible claim of the defendant States to the resources of the seabed adjacent to their coasts.

Moreover, it is clear that the federal government can, in the conduct of the nation's foreign affairs, adjust national territorial boundaries and in doing so cede territory of a state without that state's consent; indeed, the federal government has done so several times in connection with boundary disputes. See Open. Br. 209–210; Reply Br. 162; Response 11. Thus, as defendants concede (C. C. Br. 138 n. 91), the United States had ample constitutional authority to renounce the seabed seaward of the three-mile line, on behalf of the nation as a whole and of the individual states, in the exercise of its powers over foreign affairs.

b. Adoption by the United States of a three-mile territorial sea not only renounced the states' pre-existing claims, if any, to the seas and seabed beyond; it also foreclosed any such claims from subsequently arising. Thus even if, as the defendant States contend (C.C. Br. 120–129; S.S. Br. 71–75), international law of the period would have recognized a coastal sovereign's claim to the outlying seabed based upon mere proclamation, without occupation and use, such a claim could have been maintained only by the internationally recognized external sovereign; none of defendants' evidence supports their suggestion that an individual state, acting contrary to the foreign policy of the United States, could have effectively appropriated the seabed beyond the territorial sea by mere proclamation. And even if an individual state could have effected such an appropriation, none did; the record is barren of any evidence of a state proclamation of seabed ownership beyond the territorial sea during the entire period from 1789 to 1945.

Moreover, as we showed before the Special Master (Open. Br. 229–270; Reply Br. 175–183), prior to the Truman Proclamation of 1945, rights to the resources of the seabed beyond territorial waters could be obtained under international law only by prescription through occupation and use. Defendants have presented no evidence that the individual states ever achieved an effective occupation of even a portion of the vast seabed that they claim here. In any event, any such occupation by an individual state would have been recognized under international law as an occupation by and on behalf of the United States as the external sovereign; it would not have established state ownership of the seabed. *Johnson* v. *McIntosh,* 8 Wheat. 543, 572–573. Cf. *United States* v. *Louisiana, supra,* 339 U.S. at 705–706; *United States* v. *Fullard-Leo,* 331 U.S. 256.

2. The Seabed of the Outer Continental Shelf Was Affirmatively Appropriated By The United States in 1945

On September 28, 1945, President Truman "first claimed for the United States jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf contiguous to the coasts of the United States." Report, pp. 68–69. See Proclamation No. 2667, 59 Stat. 884. The Truman Proclamation marked a distinct change in the United States' position with respect to the maritime rights of coastal nations and led to similar change in international law.[41] Prior to the

[41] In particular, both Lauterpacht and Waldock, upon whom defendants rely (C.C. Br. 121–123, 126–127, 129), recognized that adoption of the continental shelf doctrine represented a change in international law. See Open Br. 233–236; 248–251.

Truman Proclamation, international law limited the coastal nation's inherent territorial rights to the three-mile territorial sea and recognized rights in the seabed beyond only where there was some form of effective occupation of the additional area claimed. See Open. Br. 216–218, 228–234, 268–270; Reply Br. 160–170, 175–183. Subsequent to the Truman Proclamation, it became widely accepted that the coastal nation could assert inherent sovereignty over the natural resources of the seabed of the adjacent outer continental shelf. See Open. Br. 234–268. This new understanding was given the force of law in 1964 by international adoption of the Convention ~~of~~ on the Continental Shelf, 15 U.S.T. (Part I) 471.

It is clear that the rights claimed by the United States under the new continental-shelf doctrine were claimed for the nation as a whole, as the external sovereign recognized by international law, and not for the individual coastal states. Defendants contend (C.C. Br. 112–113, 130–133; S.S. Br. 80) to the contrary that their claims should be tested under present rather than historic law and that as the "residual owners of the adjacent lands" (C.C. Br. 132) they are entitled to the rights newly created by the continental-shelf doctrine. But that contention is inconsistent with this Court's constitutional determination in *California* (332 U.S. at 34–36) that, in the absence of proof of valid historic title in the states, ownership of the seabed of the adjacent seas inheres in the United States as the external sovereign.

The acquisition of the seabed of the outer continental shelf, as of the three-mile territorial sea, was ac-

complished by the national government, not by the individual states. It follows that the rights to that seabed, as to the three-mile territorial sea, initially inhere in the federal government, subject only to Congress' power to dispose. Moreover, because of the potential for conflict between the coastal sovereign's exercise of continental shelf rights and the exercise by foreign nations of their rights to use the surface waters, protection and control of the continental shelf is a function that properly belongs to the national external sovereign. As this Court stated in *United States* v. *Louisiana, supra,* 339 U.S. at 705:

> If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so.

See also *United States* v. *Texas, supra,* 339 U.S. at 720.

3. The Defendant States Are Not Constitutionally Entitled To Establish Ownership Of The Seabed Out To Three Leagues From Shore On The Same Basis As The Gulf Coast States

The Submerged Lands Act grants to the Gulf coast States, but not to the defendant States, ownership of the seabed within their historic boundaries (but not beyond three leagues from their coastlines). 43 U.S.C. 1301, 1311. The defendant States' ownership under the Act is limited to the bed of the three-mile territorial sea. 43 U.S.C. 1312. They claim (C.C. Br. 133–

136) that this difference in treatment violates the equal footing doctrine.

This claim was made by the defendant Rhode Island and expressly rejected by this Court in *Alabama* v. *Texas,* 347 U.S. 272. As we said in our brief in opposition to the motion for leave to file a complaint in that case (Unnumbered Originals, O.T. 1953 at pp. 16–17):

> * * * The mere fact that this Court has held such rights to belong in the first instance to the United States as an incident of its national sovereignty (*United States* v. *California,* 332 U.S. 19) demonstrates that they are not a constitutional attribute of state sovereignty. Consequently, there can be no constitutional guarantee of equality among the States regarding them. So far as the States are legally concerned, Congress, assuming it otherwise has power to dispose of these lands, can give them to some States and not to others, just as in 1846 it gave to Tennessee, alone of the public land States, all the public lands within its borders (Act of Aug. 6, 1846, 9 Stat. 66, amending the Act of Apr. 18, 1806, 2 Stat. 381), and from time to time relinquishes federal enclaves or public lands to some states while retaining others. "Equal footing" gives Alabama no standing to complain that its marginal sea is less valuable or less extensive than Louisiana's or California's. The doctrine "does not, of course, include economic stature or standing. There has never been equality among the States in that sense." *United States* v. *Texas,* 339 U.S. 707, 716. [Footnotes omitted.]

Defendants argue (C.C. Br. 133–136), as they did before the Special Master, that the right involved

here is a political right to establish boundaries rather than a property right to seabed ownership. That argument is without substance. The denial of a right to establish boundaries in this context is nothing more or less than denial of an opportunity for the defendant States to appropriate property rights in the seabed; no political right of the defendant States is involved.[42]

CONCLUSION

For the foregoing reasons, the defendant States' exceptions to the Report of the Special Master should be overruled and judgment should be entered for the United States in accordance with the Special Master's Recommended Decree (Report, p. 82).

Respectfully submitted.

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JANUARY 1975.

[42] The special defenses of defendants North Carolina (S.S. Br. 80–83) and Georgia (S.S. Br. 84–85) were fully considered and rejected by the Special Master for reasons upon which we rely. See Report, pp. 73 (North Carolina), 19–21, 74 (Georgia). See also Reply Br. 188–189.

U.S. GOVERNMENT PRINTING OFFICE: 1975